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United States Court of Appeals

FOR THE SECOND CIRCUIT

A 169-45

SIDNEY S. LEVINE, as executor under the Last Will and Testament of ANNA M. KANE, deceased,

Libelant,

—against—

UNITED STATES OF AMERICA and the WAR DEPARTMENT OF THE UNITED STATES GOVERNMENT and the WAR SHIPPING ADMINISTRATION of such Government,

Respondents.

Proctors
For Libelant: Bernard Lefkowitz
277 Broadway

Docket Entries

June 15, 1951—Filed libel and stip. for costs ($100 Fid. and Dep. Co. of Maryland).

June 29, 1951—Filed affidavit of service.

Aug. 22, 1951—Filed exception to the libel.

Sep. 11, 1951—Filed objection to exceptions.

Feb. 11, 1953—Filed notice of motion re respondents exception to petition ret. 2-17-53.

June 9, 1953—Memo endorsed on motion papers filed 2/11/53. Exception to the libel is sustained. Dimock, *J.*

4 *Docket Entries*

June 9, 1953—Filed affidavit in opposition.

June 15, 1953—Filed order dismissing libel. Dimock, *J.*

July 10, 1953—Filed notice of appeal.

Nov. 5, 1953—Filed U. S. C. A. stip. and order extending time to file appeal record to 11-13-53.

Nov. 13, 1953—Filed U. S. C. A. stip. and order extending time to file appeal record to 11-17-53.

5

6

Libel

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

In Personam
In Admiralty

[SAME TITLE]

The petition of the Libelant, through his attorney, Bernard Lefkowitz, shows to this Court and alleges:

First: That on the 2nd day of February, 1946, the Surrogate's Court of the County of the Bronx, city and state of New York, issued to the libelant Letters Testamentary under the Last Will and Testament of Anna M. Kane, deceased, who departed this life on the 10th day of January, 1946; that the libelant duly qualified as such Executor and a certificate of the Clerk of the Surrogate's Court, County of Bronx, State of New York, was duly issued showing that Letters Testamentary were issued to the libelant under the Last Will and Testament of the said Anna M. Kane, deceased.

Second: That Anna M. Kane was the mother of Patrick J. Kane, Jr., who died on the 24th day of June, 1945 as a result of mortal injuries received by him on the 19th day of June, 1945, while he was engaged by and under orders of the War Department of the United States in one of the operations of the war.

10 *Libel*

Third: That on the 19th day of May, 1944, and subsequent thereto, the said Patrick J. Kane, Jr., was employed by the Army Service Force New York Port of Embarkation, New York and continued in said service until his death on June 24th, 1945.

Fourth: That the time of his death, the said Patrick J. Kane, Jr., was Chief Engineer of the Marine Division of what is known as the Army Transport Service.

11 Fifth: Upon information and belief, that pursuant to Public Law No. 267 of the 64th Congress and other governmental regulations, the libelees agreed to insure the said Patrick J. Kane, Jr., in the sum of Five Thousand Dollars ($5,000.00), if his death was sustained as a result of the risks of the war or war-like operations, and further agreed to insure his life pursuant to the Merchant Marine Act of the United States and the United States Employees Compensation Act, if death was sustained while in the performance of duty, and in addition to the above, as more fully provided for by Subdivision "C" of the Marine
12 Personel Regulations of the Chief of Transportation of the United States Government, which is as follows:

> "If disability or death is sustained by a crew member, not as result of the risks of war or of warlike operations nor as a result of marines risks, the insurance procured from the War Shipping Administration shall not be payable, but the employee concerned shall be eligible for the benefits of the United States Employees' Compensation Act if the disability or death was sustained while in the performance of duty. On the other hand, if disability or death is sustained by a crew member

as a result of the risks of war or warlike operations, the employee concerned will be eligible for both insurance payments and compensation benefits. The U. S. Employees' Compensation Commission is by statute authorized to make final decisions, there being no appeal to a higher authority. The Compensation Commission has declared that it would as a matter of policy, rule that any benefits paid under the Policy of Insurance would be offset against compensation benefits; i.e., if a beneficiary or beneficiaries elect to accept a lump sum payment of $5000.00 under the Policy of Insurance, no compensation benefits will be paid until such time as the total monthly payments prescribed in the compensation act would total the amount of insurance benefits paid. After the expiration of such period, should the legal beneficiary or beneficiaries named in the Compensation Act still be eligible for compensation benefits, such benefits will be extended to execute in full the statutory obligation of the United States Government by reason of Public Law No. 267—64th Congress."

Sixth: That on the 4th day of September, 1944, pursuant to statute and governmental regulations, the said Patrick J. Kane, Jr., duly designated his mother, Anna M. Kane, above named, his beneficiary of any and all war risk benefits payable in the event of his death; that a copy of said certificate is hereby annexed and made a part hereof as if the same was set out in full.

Seventh: That Patrick J. Kane, Jr., duly accepted war risk benefits and insurance tendered to him by the

libelees pursuant to governmental regulations of the Marine Personel Regulations issued by the chief of Transportation of the United States Government and for good and valuable consideration, the same became a contract between said Patrick J. Kane, Jr., and the libelees.

Eighth: Upon information and belief, on the 24th day of June, 1945, said Patrick J. Kane, Jr., died as a result of injuries sustained by him on the 19th day of June, 1945,
17 while on duty under orders from the libelees and while engaged in warlike operations for the libelees and as result of one of the risks of war.

Ninth: That due proof of loss was furnished to the libelees of said death of said Patrick J. Kane, Jr., but the libelees have refused, failed and neglected to pay the whole or any part of said insurance or death benefit, although duly demanded.

Tenth: That your libelant is a citizen of the United States of America, is loyal to his government and state
18 and has no sympathies whatsoever with any of the enemies of the United States of America and that your libelant, the testator and said Patrick J. Kane, Jr., are and were citizens of the United States of America and at all times bore true allegiance to the United States and never in any way whatsoever voluntarily aided, abetted or given encouragement to rebellion against said government.

Eleventh: That pursuant to the Merchant Marine Act and Section 1128-D of 46 U. S. C., provision is made that in the event of "disagreement as to a claim for losses or

the amount thereof, on account of insurance under sections 1128 and 1128-H of this Title, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty."

Twelfth: That the libelant resides in the City of New York, County of Bronx, which is within the jurisdiction of this court.

Thirteenth: That by reason of the aforesaid, this action can not be brought in any court except the United States District Court sitting in Admiralty.

Fourteenth: That libelant is justly entitled to recover the sum of $5,000.00, the amount claimed as aforesaid after all debts, credits and offsets; that there has been no transfer of the whole or any part of said claim by Congress or any department of the Government except as aforesaid.

Fifteenth: That there is now due and owing to your libelant from the libelees, the sum of Five Thousand Dollars ($5000.00), with interest from the 24th day of June, 1945.

22 *Libel*

WHEREFORE, your libelant prays this Court for judgment against the libelees in personam in the sum of Five Thousand Dollars ($5,000.00) with interest from the 24th day of June, 1945 and for such other, further and different relief as to this Court may seem just and proper.

BERNARD LEFKOWITZ,
Attorney for the Libelant,
Office & P. O. Address,
277 Broadway,
23 New York 7, N. Y.

(Duly verified June 14, 1951.)

24

25

EXHIBIT A

WAR DEPARTMENT

Certificate of

Designation or Change of

Beneficiary

Kane, Patrick J.
(Name of Employee)

26

00 0311203348
(Certification of Identification number)
105-10-5289
(Social Security Number)

War Risk Benefits

War Risk benefits are provided for Masters, Officers, and Crew Members (civilian employees), of the War Department. A statement of the benefits, and of the conditions under which benefits are provided, are written into and are a part of the shipping articles. You are requested to name the person or persons whom you wish to receive the benefits for loss of life. Sign this form after the beneficiary's name has been filled in.

27

You may designate one or more of the following persons:

(a) Your wife.

(b) Your children.

(c) Your parents.

(d) Your brothers and sisters.

(e) Your grandparents and grandchildren.

(f) Your aunts and uncles.

(g) Your nephews and neices.

28 *Exhibit A*

BUT NO ONE ELSE.

I hereby designate the following person or persons whose name or names appear hereon as beneficiary or beneficiaries of war risk benefits payable in the event of death. This designation shall continue in force for benefits now provided, and for such benefits as changed or amended from time to time by the War Department, until this designation is revoked or changed by me.

29 (One, two, or more beneficiaries may be named if division of benefits is desired.)

PRIMARY			
	Name Anna Kane	Name	Name .....
	Address	Address	Address
	151 Marine St.,	.....	.....
	City Island,	.....	.....
	N.Y.C., N.Y.	.....	.....
	Relationship	Relationship	Relationship
	Mother	Age	Age
	Age 62 Share 100%	Share %	Share %

30 If none of the above survive to receive payment, then such of the following as may be living:

CONTINGENT			
	Name	Name	Name .....
	.....	.....	.....
	Address	Address	Address
	.....	.....	.....
	.....	.....	.....
	Relationship	Relationship	Relationship
	.....	.....	.....
	Age .... Share .....%	Age	Age .....
		Share ..... %	Share ..... %

Exhibit A

I request that my benefits for loss of life be paid in installments:

Yes ..... No X

Dated at New York this 4th day of September 1944.

Witness Geo. T. Baker	Patrick J. Kane
(signature)	(signature of Employee)
Geo. T. Baker	"LT-579" 1st Asst. Engr.
1st Lt., T.C.	(vessel and rating)
(Official Title)	Same as above
N.Y.P.E.	(Address of Employee)
(Address)	

This designation revokes all previous designations and WILL REMAIN IN FORCE UNTIL A NEW CERTIFICATE IS EXECUTED BY THE EMPLOYEE.

This form, when completed, will be retained by the Employee.

34 **Exception to Libel**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Adm. 169-45

[SAME TITLE]

35 The respondent, appearing specially herein, respectfully excepts to the libel of Sidney S. Levine, as Executor under the last Will and Testament of Anna M. Kane, for want of jurisdiction of this Honorable Court of the person of the respondent and of the subject matter of this proceeding on the ground that it appears from the libel, which was filed in this Court on June 15, 1951, that the alleged cause of action arose on June 24, 1945, the date of the death of Patrick J. Kane, Junior, and from the docket of this Court, that the suit was not commenced within two years after the alleged cause of action arose.

36 WHEREFORE, respondent prays that the libel herein be dismissed with costs.

IRVING H. SAYPOL
United States Attorney
Proctor for Respondent
Office & P. O. Address:
45 Broadway, New York 6, New York

To:

BERNARD LEFKOWITZ, Esquire
277 Broadway
New York, New York

37

Answering Affidavit of Sidney S. Levine

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

38

SIDNEY S. LEVINE, being duly sworn, deposes and says:

That he is the libelant herein. That deponent was also the attorney for the deceased prior to her death.

That the sole question the libelees attempt to raise by this exception is the Statute of Limitation.

Deponent submits that the Statute of Limitations is a defense and must be pleaded by answer and proved upon a trial.

STRZELICAK v. CHICAGO FRATERNAL LIFE ASS'N.
233 App. Div. 641, 253 N. Y. S. 346

39

In that case the plaintiff sued to recover for an insurance risk after the designated time specified in the agreement but the court held that inasmuch as the plaintiff had served the proof of loss in due time conditions may have arisen that could have extended the short Statute of Limitations.

So in the case at bar it is alleged and consequently not denied that due proof of loss was served. (Paragraph Ninth)

That deponent had quite some correspondence with the libelees regarding this claim after the service of due proof

of loss which upon a trial could be construed as a suspension of the statute, particularly in view of the statute cited by the libelee's attorney that the action can be commenced only "upon disagreement as to a loss." Only upon a trial can it be shown when the actual disagreement occurred. This is also alleged in paragraph "Eleventh" of the petition and in the absence of any allegation by answer by the libelees alleging when, if any, disagreement occurred it cannot be determined when the statute began to run.

There can be no trial of any issue of fact on the hearing of exceptions and therefore if the libelant is able upon a trial to sustain the "Seventh" paragraph of the petition that the deceased had a contract of insurance with the libelees then the six year Statute of Limitations would govern in this case. (Erreg v. S.S.C. Alaska 179 Fed. 2d 2401)

SIDNEY S. LEVINE

(Sworn to April 14, 1953.)

Opinion of the Court 43

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 169-45

[SAME TITLE]

MEMORANDUM

44 The respondents except to the libel which seeks to recover benefits of Government war risk insurance on the life of a civilian employee of the War Department's Army Transport Service. Libelant's decedent died on June 24, 1945, and the libel was filed in this court on June 15, 1951. The exception is taken on the ground that the suit was not commenced "within two years after the cause of action arises" as required by 46 U. S. C. § 745.

Libelant apparently contends that the suit is based on a contract of insurance and that therefore a six-year period of limitation should apply. The premise for this conclusion has been thoroughly considered in a prior litigation before 45 the Court of Claims, Levine v. United States, 80 F. Supp. 674, and I do not think that it requires any further comment. There it has concluded that the claim was founded on United States statutes and governmental regulations rather than a contract of insurance.

Suits to recover on government war risk insurance policies are authorized by 46 U. S. C. § 1292. That section also provides that such suits shall be heard and determined under the provisions of the Suits in Admiralty Act, 46 U. S. C. § 741 et seq.

Libelant contends that the exception merely pleads the statute of limitations, and that the statute of limitations

is a defense which must be pleaded by answer and proved upon a trial. The Supreme Court, however, has expressly stated that in a suit under the Suits in Admiralty Act the time bar fixed by that Act is properly and sufficiently pleaded in exceptions to the libel. Fleet Corp. v. Rosenberg Bros., 276 U. S. 202, 214. The limitation period fixed by that Act is not a mere limitation; it is part of the right itself. Osbourne v. United States, 2 Cir., 164 F. 2d 767. Sgambati v. United States, D. C. S. D. N. Y., 75 F. Supp.
47 18, and affirming opinion, 2 Cir., 172 F. 2d 297. The libelant must, therefore, allege sufficient facts to show affirmatively that the suit was timely brought, otherwise an exception to the libel must be sustained. Alcoa Steamship Co. v. United States, D. C. S. D. N. Y., 94 F. Supp. 406, 408.

Libelant argues that, in view of the statutory language that "Upon disagreement as to a loss insured under this title, suit may be maintained * * *" 46 U. S. C. § 1292, the time period does not begin to run until there is a disagreement and that only upon a trial can it be shown when an actual disagreement occurred. That same section, however,
48 also provides:

> "The period within which suits may be commenced contained in sections 741-752 of this title shall, if claim be filed therefor within such period, be suspended from such time of filing until the claim shall have been administratively denied by the Secretary and for sixty days thereafter: *Provided, however,* That such claim shall be deemed to have been administratively denied if not acted upon within six months after the time of filing, unless the Secretary for good cause shown shall have otherwise agreed with the claimant."

"The period within which" a suit like this "may be commenced contained in (section 745) of this title" is "two years after the cause of action arises" but, "if claim be filed therefor within such period," the statute suspends that period "from such time of filing until the claim shall have been administratively denied by the Secretary and for sixty days thereafter." The question presented is whether "the cause of action arises" and the limitation period begins at the time of the loss or at the time of the disagreement on the claim. Since the statute provides for 50 suspension of the period if the claim is filed within it, the period must begin at the time of the loss. The claim could not, in the nature of things, be filed during the period beginning at the time of the disagreement on the claim.

To be effective, therefore, a claim must have been filed on or before June 24, 1947, or two years after June 24, 1945, the date of the death of libelant's decedent. A timely suit could perhaps have been brought within sixty days after the elapse of six months but that period expired sixty days after December 24, 1947. The only other timely alternative is a possible extension of the time for administrative denial by agreement between the Secretary and 51 the claimant and a denial thereunder less than sixty days before June 15, 1951, when the libel was filed. Libelant has made no such allegation and, as above stated, his libel must show that the suit is timely. I must conclude, therefore, that the suit is barred.

Exception to the libel sustained.

E. J. Dimock
United States District Judge

Dated: June 9, 1953

52

Order Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 169-45

[SAME TITLE]

53 The respondents having excepted to the libel herein on the ground that this Court lacks jurisdiction of the respondents and of the subject matter of this proceeding in that it appears from the libel which was filed in this Court on June 15, 1951 that the alleged cause of action arose on June 24, 1945, the date of the death of Patrick J. Kane, Jr., and from the docket of this Court, that the suit was not commenced within two years after the alleged cause of action arose, and said exception having been brought on for hearing before this Court on April 14, 1953,

54 Now, on reading the libel herein, the respondents' exception thereto filed herein on August 22, 1951 and the affidavit of Sidney S. Levine sworn to April 14, 1953, and after hearing J. Edward Lumbard, United States Attorney (Benjamin H. Berman, Esq. and Louis E. Greco, Esq., Attorneys, Department of Justice, of counsel), in support of said exception, and Bernard Lefkowitz, Esq. (Sidney S. Levine, Esq., libelant pro se), proctor for the libelant, in opposition thereto, and due deliberation having been had by the Court and the memorandum opinion of the Court dated June 9, 1953,

Order Appealed From 55

Now, on motion of J. Edward Lumbard, United States Attorney, proctor for the respondents herein, it is

ORDERED that the respondents' exception to the libel herein be and the same hereby is sustained; and it is

FURTHER ORDERED that the libel herein be and the same hereby is dismissed.

Dated: New York, N. Y.
June 12, 1953. 56

E. J. DIMOCK
U. S. D. J.

57

58

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 169-45

SIDNEY S. LEVINE, as Executor under the Last Will and Testament of ANNA M. KANE, Deceased,

59 *Libelant,*

—against—

UNITED STATES OF AMERICA and the WAR DEPARTMENT OF THE UNITED STATES GOVERNMENT and THE WAR SHIPPING ADMINISTRATION of such government,

Respondent.

SIR:

60 PLEASE TAKE NOTICE that the libelant hereby appeals to the United States Circuit Court of Appeals from the order of this Court dated June 12, 1953 sustaining the respondents exceptions to the libel herein and dismissing the libel herein and the libelant further appeals from each and every part of said order.

Dated: New York
July 1953.

Notice of Appeal 61

Yours, etc.,

BERNARD LEFKOWITZ,
Attorney for Libelant,
Office & P. O. Address,
277 Broadway,
New York 7, N. Y.

To:

HON. J. EDWARD LUMBARD,
United States Attorney
Proctor for U. S. A.
1003 U. S. Court House,
Foley Square, New York 7, N. Y. 62

63

64

Stipulation as to Record

UNITED STATES DISTRICT COURT

~~Eastern~~ Southern DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is
65 a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated: November 13, 1953

BERNARD LEFKOWITZ
Attorney for Libelant-Appellant

HON. J. EDWARD LUMBARD
United States Attorney
Attorney for Respondents-Appellees

66

67

Clerk's Certificate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

68

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. The last day to file this record is November 17, 1953.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 17 day of November in the year of our Lord one thousand nine hundred and fifty-three and of the Independence of the said United States the one hundred and seventy-eighth.

69

WILLIAM V. CONNELL,
Clerk.

[Seal]

No. 212

JUL 14 1954
HAROLD B. WILLEY, Cle

Supreme Court of the United States

SIDNEY S. LEVINE, as Executor under the Last Will and Testament of ANNA M. KANE, deceased,

Petitioner-Libelant,

against

UNITED STATES OF AMERICA and the WAR DEPARTMENT OF THE UNITED STATES GOVERNMENT and THE WAR SHIPPING ADMINISTRATION of such Government,

Respondents.

PETITION

The petitioner respectfully shows to this Court as follows:

The petitioner at the time of the commencement of this suit was a resident of the City of New York, residing at 2856 Grand Concourse, City and State of New York.

That the judgment sought to be reviewed herein was decided and entered in the office of the Clerk of the United States Court of Appeals for the Second Circuit on the 24th day of March, 1954 and the judgment was made the judgment in the United States District Court for the Southern District of New York on the 14th day of April, 1954 which said judgment of the United States Court of Appeals affirmed an order of the United States District Court for the Southern District of New York, dated June 12, 1953 sustaining respondents' exceptions to the libel and dismissing petitioner's libel on the merits. The libel was filed in the District Court of the United States for the Southern District of New York on the 15th day of June, 1951 by Sidney

S. Levine, as Executor under the Last Will and Testament of Anna M. Kane, deceased, against the United States of America, the War Department of the United States Government and The War Shipping Administration of such Government.

The libel sets forth that on the 2nd day of February, 1946 the Surrogate's Court of the County of Bronx, State of New York issued letters testamentary to petitioner under the Last Will and Testament of Anna M. Kane, deceased, who departed this life on the 10th day of January, 1946; and that the petitioner duly qualified as such Executor under said Last Will and Testament of Anna M. Kane, deceased.

That said Anna M. Kane was the mother of Patrick J. Kane, Jr., who on the 24th day of June, 1945, as a result of mortal injuries received by him on the 19th day of June, 1945 while he was engaged by and under orders of the War Department of the United States in one of the operations of the war, died.

That on the 19th day of May, 1944 and subsequent thereto said Patrick J. Kane, Jr. was employed by the Army Service Force New York Port of Embarkation, New York and continued in said service until his death on June 24, 1945; that at the time of his death said Patrick J. Kane, Jr. was Chief Engineer of the Marine Division of what is known as the Army Transport Service.

That said libel further sets forth that pursuant to Public Law No. 267 of the 64th Congress and other Government Regulations the respondents agreed to insure said Patrick J. Kane, Jr. in the sum of Five thousand and 00/100 ($5,000.00) Dollars if his death was sustained as a result of risks of war or war like operations and further agreed

to insure his life pursuant to the Merchant Marine Act of the United States and United States Employees Compensation Act if death was sustained while in performance of his duties.

That said petition further alleges that the policy in which said Patrick J. Kane, Jr. was insured provided that if death is sustained not as a result of the risks of war or war like operations, nevertheless, substantial benefits in the nature of insurance would enure to the benefit of his survivors and states specifically in part as follows:

> "That any benefits paid under the Policy of Insurance would be offset against compensation benefits; i. e., if a beneficiary or beneficiaries elect to accept a lump sum payment of $5000.00 under the Policy of Insurance, no compensation benefits will be paid until such time as the total monthly payments prescribed in the compensation act would total the amount of insurance benefits paid."

Said libel further showed that said Patrick J. Kane, Jr. died on the 24th day of June, 1945 as a result of injuries sustained by him on the 19th day of June, 1945 while under orders from the libelees and while engaged in war like operations for the libelees as a result of one of the risks of war.

That under the policy his mother, Anna M. Kane was duly designated as beneficiary under said policy. That his mother, Anna M. Kane beneficiary under said policy, died on the 10th day of January, 1946 and up to the time of her death had received no payment under said policy and that petitioner thereafter was duly appointed and qualified as Executor under the Last Will and Testament of his mother as hereinabove alleged.

That irrespective of various Public Laws and Statutes alleged in the libel, the libel further alleges in part as follows:

> "That Patrick J. Kane, Jr., duly accepted war risks benefits insurance tendered to him by the libelees * * * and for good and valuable consideration, the same became a contract between said Patrick J. Kane, Jr. and the libelees."

The District Court for the Southern District of New York sustained respondents' objections to the libel and dismissed the libel on the merits on the ground that the libelant's claim was barred by the two year statute of limitations.

It is the petitioner's contention that suit under such a contract was protected by the six year statute of limitations.

The opinion of the District Court referred to a prior suit of the libelant in the Court of Claims (Levine v. United States, 80 F. Supp. 674). That petition, as a perusal of that opinion will show, dismissed the petitioner's claim in the Court of Claims solely on the ground of failure of jurisdiction of that Court but it must be noted in the opinion of the Court of Claims, the Court said by Jones, Chief Judge:

> "This is not to say, of course, that the statutes and regulations under which it is asserted such war-risk benefits and insurance were tendered to and accepted by Kane may not have given rise to an obligation that has the force of a binding contract with him. See Lynch v. United States, 292 U. S. 571" (fols. 43-51)."

However, assuming, but not admitting, that this case could not be brought under the six year statute of limitations the libelant is protected by the suspension of Title 46 U. S. C. Section 1128d which limits an action under said Section to two years and was not reinstated under the war risk insurance act until September 7, 1950 64 Stat. 773, 46 U. S. C. 1281-1294 and that the statute of limitations could not run under said period of time when the act was suspended as no action could be commenced during said sus-

pension period and the filing of the libel under the circumstances was timely.

A perusal of the libel in this case alleges a contract of which the District Court had jurisdiction. The libel in the case at bar alleges that due proof of loss was served upon the libelees but omits to state the date of the service of such proof of loss (fol. 17). The libelees' right of action to sue in the District Court under Title 46 U. S. C. Section 1128d was suspended on July 25, 1927 (61 Stat. 449, 450), but was reinstated under the War Risk Insurance Act of September 7, 1950 (64 Stat. 773, 46 U. S. C. 1281-1294). Thus assuming that the libelant's claim was solely under the War Risk Insurance Act the Statute of Limitations was automatically suspended by the Acts of Congress from July 25, 1947 to September 7, 1950.

However, the libelant-appellant bases his claim on a broader ground of general contract and relies upon the Six Year Statute of Limitations. The libelees did not dispute the fact that Patrick J. Kane, Jr. died while in the service of his Country.

That the petitioner in the United States Court of Appeals contended as follows:

> The decision of the Court of Claims dismissing the libelant's petition in that Court is purely on the question of jurisdiction and is not *res adjudicata* in the case at bar.
>
> There is no reason why the libelees could not make a common law contract with the deceased to insure him for Five Thousand and 00/100 ($5,000.00) Dollars in the event of death while engaged in war-like operations. Such a contract might be made in addition to the deceased's rights under the Suits & Admiralty Act.

The libel alleges very clearly that "the libelees agree to insure said Patrick J. Kane, Jr. in the sum of Five Thousand and 00/100 ($5,000.00) Dollars if his death was sustained as a result of risks of war or war-like operations" (fols. 16-17), and again the libel alleges that the said insurance was tendered to the deceased, Patrick J. Kane, Jr., by the libelees and accepted by him "and for good and valuable consideration, the same becoming a contract between said Patrick J. Kane, Jr. and the libelees." Exhibit "A" annexed to the libel refers to the agreement between the parties as "shipping articles," which is the usual appellation applied to Maritime Contracts (fols. 26-27).

This liability of the libelees on contract is in addition to the statutory liability of the libelees under the War Risk Insurance Act and is based on a simple contract and is only barred by the Six Year Statute of Limitations. (Erreg v. S. S. C. Alaska, 179 Fed. 2d 2401.)

At the time the Court of Claims dismissed the libelant's claim in that Court on November 1, 1948, Title 46 U. S. C. A. Sec. 745, Sec. 1128d had already been repealed by Congress (61 Stat. 449, 450). Although the libelant had a claim under Title 46 when he filed suit in the Court of Claims it automatically fell when the act was repealed as there was no saving clause in the act.

Strange as it may seem, but it is true, that neither counsel nor the Court of Claims were aware of this fact either at the time of the argument or the rendition of the decision. Thus upon the repeal of that act the libelant's only remedy was a common law action on contract. Assuming, but not admitting that libelant had no remedy on contract at the time of the repeal

of Title 46 on July 25, 1947 then libelant was without any remedy until the enactment of the War Risk Insurance Act of September 7, 1950. Libelant could have no cause of action since the enactment of the latter statute (September 7, 1950). Hence the Statute of Limitations could not possibly begin to run until September 7, 1950.

It stands to reason that a Statute of Limitation cannot run against a party when he has no cause of action.

As Article 45 was repealed it must be considered as dead as if it was ten thousand leagues below the sea.

The libelant's cause of action accrued afresh by the enactment of September 7, 1950 and the Statute of Limitations of two years can only run from that date. As the libel was filed herein on June 15, 1951 it was thus timely instituted.

WHEREFORE, your petitioner prays this Court that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for the purpose of reviewing this determination affirming its dismissal of libelant's petition and that the determination of the United States Court of Appeals for the Second Circuit be reversed and exceptions to the libel dismissed.

Dated: New York, June 9, 1954.

SIDNEY S. LEVINE, *Petitioner.*

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

SIDNEY S. LEVINE, being duly sworn, deposes and says, that he is the petitioner herein; that he has read the foregoing petition for a writ of certiorari herein; that the same is true of his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes them to be true.

SIDNEY S. LEVINE.

Sworn to before me this
10th day of June, 1954.
Arthur Berliner,
Notary Public for the State of New York,
No. 03-5288600.
Qualified in Bronx County.
Cert. filed with Bronx and New York
County Clerk & Register.
Commission Expires March 30, 1956.

I, M. JAY MECKLER, being duly admitted to practice in the Supreme Court of the United States, do hereby certify that I have read the foregoing petition and the same in my opinion sets forth good and meritorious grounds for a writ of certiorari to this Court.

M. JAY MECKLER,
Attorney for Petitioner,
Office & P. O. Address,
277 Broadway,
New York 7, N. Y.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 148—October Term, 1953.

(Argued March 9, 1954 Decided March 24, 1954.)

Docket No. 22917

SIDNEY S. LEVINE, as Executor under the Last Will and Testament of ANNA M. KANE, deceased,

Libelant-Appellant,

— v. —

UNITED STATES OF AMERICA and the WAR DEPARTMENT OF THE UNITED STATES GOVERNMENT and the WAR SHIPPING ADMINISTRATION of such Government,

Respondents-Appellees.

Before:

CLARK, MEDINA, and HARLAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

Appeal by libelant from a decision, D. C. S. D. N. Y., 115 F. Supp. 58, and final order sustaining an exception to his libel for the benefits of government war risks insurance on

the ground of expiration of the period of limitation for suit provided in the contract and by law.

———o———

SAMUEL SWEETBAUM, New York City (Bernard Lefkowitz, New York City, on the brief), *for libelant-appellant.*

BENJAMIN H. BERMAN, Atty., Dept. of Justice (Warren E. Burger, Asst. Atty. Gen., Leavenworth Colby, Sp. Asst. to the Atty. Gen., and J. Edward Lumbard, U. S. Atty., New York City, on the brief), *for respondents-appellees.*

———o———

PER CURIAM:

Order of dismissal on the merits affirmed on the opinion of Judge Dimock, D. C. S. D. N. Y., 115 F. Supp. 58; *Gregory* v. *United States*, 2 Cir., 187 F. 2d 101; and the statute then applicable, 46 U. S. C. §§ 1128d, 1128e.

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